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CHUA ENG HONG & ANOR

v.

PALM SPRINGS DEVELOPMENT SDN BHD

*b*HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-(S1)-22-365-1999]
2 MAY 2001*c*

LAND LAW: *Housing developers - Sale and purchase agreement - Defendant failed to complete and deliver vacant possession within stipulated time - Failure to apply for extension under reg. 11(3) of the Housing Developers (Control & Licensing) Regulations 1989 - Whether the period of 36 months could be waived - Whether extension of time could be given*

d

The plaintiffs as purchasers entered into a sale and purchase agreement ("the agreement") with the defendant concerning a fully completed condominium unit ("the property"). It was an express term of the agreement pursuant to cl. 7 that time was of the essence, and that the defendant was required to complete and deliver vacant possession of the property together with the common facilities within 36 calendar months from the date of the agreement. The defendant had failed to do this within the stipulated time. The plaintiffs then took out a summons under O. 14 r. 3 of the Rules of the High Court 1980 ("RHC") and prayed for judgment for RM295,637.95. The learned senior assistant registrar dismissed the application. Hence, the plaintiffs appealed.

*e***Held:***f*

[1] Since the agreement was in the statutory form in compliance with reg. 11(1) of the Housing Developers (Control & Licensing) Regulations 1989 (the Regulations) and the period of completion had been stipulated as 36 months and time being stipulated as being the essence of the contract, the defendant ought to have completed and deliver the vacant possession of the property within the stipulated period.

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[2] The defendant ought to have applied for extension of time under reg. 11(3) of the Regulations for the controller to waive the period of 36 months and to give such further extended time as was necessary. The defendant had not in any of its affidavits provided any evidence that such application had been made.

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[2a] As the defendant had failed to show it had complied with reg. 11(3) of the Regulations, the court entered judgment for the plaintiffs in the undisputed sum of RM295,637.95. a

[Appeal allowed.]

Legislation referred to: b

Housing Developers (Control & Licensing) Regulations 1989, reg. 11(1), (3)
Rules of the High Court 1980, O. 14 r. 3

For the appellant/plaintiff - Wong Hok Mun; M/s Azim, Tunku Farik & Wong
For the respondent/defendant - Eugene Roy Joseph; M/s William Leong c

Reported by Suhainah Wahiduddin

JUDGMENT

RK Nathan J:

Facts d

The plaintiffs as purchasers and the defendant as developer/vendor entered into a sale and purchase agreement on 5 January 1995 whereby the plaintiffs agreed to buy and the defendant agreed to sell a fully completed condominium unit known as Unit No. BV-013-2 Riverine Villas, Palm Springs Resort, Port Dickson, held under the master title H.S.(D) 12925 Lot No. P.T. 2873 Mukim Pasir Panjang, District of Port Dickson, Negeri Sembilan (the property) for a purchase price of RM368,995 to be paid in stages, and by instalments in accordance with the architect's certificates and in accordance with the terms of the agreement. e

Amongst the express terms of the said agreement were the following, namely:

- (a) That in accordance with cl. 22(1) of the agreement, the defendant agreed and was thereby required to complete and deliver vacant possession of the property together with connection of water and electricity supply within 36 calendar months from the date of the agreement. g
- (b) That in accordance with cl. 24 of the agreement, the defendant agreed and was thereby required to complete the common facilities of the property within 36 calendar months from the date of the agreement. h

It was also an express term of the agreement in accordance with cl. 7 that time was of the essence. The plaintiffs and the defendant also entered into a deed of covenant on the same day the agreement was signed for the use of the Golf Club and Marina Club facilities. The defendant failed to complete i

- a* and deliver vacant possession of the said property and also failed to complete the common facilities, within the stipulated time. The plaintiffs then gave the defendant notice of termination of the agreement by their solicitors' letter dated 13 April 1999 and claimed the following:
- b* (1) Refund of monies paid by the plaintiffs to the defendant and/or agents of the defendant towards purchase of the property, refund of utility deposits and legal fees incurred by the plaintiffs towards purchase of the property RM295,637.95
- c* (2) Financing costs incurred by the plaintiffs towards purchase of the property from 28 September 1994 to 26 June 1998 inclusive of interest at the rate of 10% per annum RM 64,847.96
- d* (3) Refund of monthly Golf Club subscriptions paid by plaintiffs from February 1998 to October 1998 RM 756
- Total RM361,241.91

e The plaintiffs also sought a declaration that they had effectively terminated the agreement and also prayed for damages, interest and costs. The plaintiffs then took out a summons under O. 14 r. 3 of the Rules of the High Court 1980 (the RHC) and prayed for judgment for RM295,637.95 and costs.

On 26 January 2000 the learned senior assistant registrar (SAR) heard and dismissed the said application for summary judgment. The plaintiffs appealed.

f **The Appeal**

g There is no denying the fact that the plaintiffs had indeed paid the sum of RM295,637.95. Counsel for the defendant/respondent confirmed this as correct. It is also not in dispute that the time for completion had long since expired. Since the agreement was signed on 5 January 1995, the 36 months being the completion period would have been 4 January 1998.

h The defendant pleaded frustration and argued that as the soil on which the condominium is constructed is of such a nature, it would be impossible to complete the construction within the 36 months provided. Mr. Joseph for the respondent confirmed that that was his only defence before me.

i Mr. Wong for the appellant pointed out that since the agreement was in the statutory form in compliance with reg. 11(1) of the Housing Developers (Control & Licensing) Regulations 1989 and the period of completion had been

stipulated as 36 months and time being stipulated as being the essence of the contract, the defendant ought to have completed the condominium within the stipulated period. It is necessary for a proper consideration of the respective submissions to reproduce reg. 11. It reads as follows: **a**

11 Contract of sale **b**

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisinal portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, it shall be in the form prescribed in Schedule H. **c**

(2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.

(3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions: **d**

Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller. **e**

Having considered the said Regulation, I accept the submission of the appellant that for the controller to waive the period of 36 months and to give such further extended time as is necessary the defendant ought to have applied for such extension under reg. 11(3). Unfortunately, the defendant has not in any of its affidavits provided any evidence that, (a) such application had been made, (b) that it was made before the expiry of the 36 months, and (c) that the controller had waived or modified such compliance. Having perused the affidavits of the defendant I note that the defendant has failed to show why it was unable to complete within the required period. In any case even if it can show the reason, that does not provide it a way out. It still ought to apply to the controller for a waiver by showing to the controller why it is unable to comply. The special circumstances referred to in the proviso to reg. 11(3) can mean the doctrine of frustration, but it is not for this court to decide on the issue of frustration. That ought firstly to be raised before the controller. **f**
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- a* When asked by the court as to what the present position of the said project is, counsel for the defendant requested for time to file an affidavit. I did not see the need to adjourn on that score. Since the defendant had failed to show it had complied with reg. 11(3) I set aside the order of the learned SAR given on 26 January 2000 and entered judgment for the plaintiffs in the undisputed sum of RM295,637.95 and decided that the case do proceed in respect of the rest of the prayers. I also awarded the plaintiffs the costs of the appeal and fixed a date for case management.
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